Public Prosecutor v Pasupathy s/o Kanagasaby

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO B–09–23 OF 1995
LAMIN PCA, MOKHTAR SIDIN AND MOHD SAARI JJCA
12 JANUARY 2001

Criminal Procedure *— Appeal — Procedures for, principles governing — Appeal by public prosecutor — Whether an appeal by public prosecutor under s 50(3) of the Courts of Judicature Act 1964 is confined to questions of law — Courts of Judicature Act 1964 s 50(2), (3)*

Criminal Procedure *— Trial — Close of prosecution's case — Test to be applied — Whether magistrate applied correct test at the close of the prosecution's case — Case decided before amendment to s 173(f) of the Criminal Procedure Code — Whether curable on facts*

Criminal Procedure *— Trial — Defence's case — Test to be applied — Whether magistrate applied correct test at the close of the defence's case — Criminal Procedure — Trial — Identification parade — Fairness — Whether identification parade conducted properly*

The respondent was charged in the magistrate's court on a principal and an alternative charge. The respondent was convicted and sentenced on the alternative charge. Being dissatisfied with the said decision, the respondent then appealed to the High Court, who allowed the appeal and set aside the conviction and sentence. The public prosecutor appealed to the Court of Appeal. The issues for determination were: (i) whether an appeal by the public prosecutor under s 50(3) of the Courts of Judicature Act 1964 ('CJA') is confined to questions of law and whether the appeal should be dismissed since there was not a single question of law formulated by the prosecution when filing the petition of appeal as envisaged by s 50(2) of the CJA; (ii) whether the magistrate applied the right test at the close of the prosecution and also at the close of the defence; and (iii) whether the identification parade was properly held.

Held, appeal dismissed:

(1) (per **Lamin PCA**) Section 50(2) of the CJA is aimed to make provision for an appeal requiring leave. When leave is required to be applied for, it connotes that the applicant has to satisfy the court as to a certain condition; meaning there must be a subject matter for arguments. In s 50(2) of the CJA, the applicant must show whether or not there exist questions of law. The existence or otherwise of the questions of law is the subject matter for submission before the court while applying for leave. On the other hand, the public prosecutor needs only to file a notice of appeal and for that purpose it is expressly provided that 'no leave' is required. That means that there is nothing to submit before the

court. Therefore, the public prosecutor is not required to show to the court that there are 'questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision' (see pp 148H–149A).

(2) (per **Mokhtar Sidin JCA**) It is common ground that this case was heard and decided by the learned magistrate before the amendment to s 173(f) of the Criminal Procedure Code ('CPC') and that the amendment had no retrospective effect. In view of that, the standard of proof as stated in *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1 applied. The test to be applied by the magistrate at the close of the prosecution was the 'beyond reasonable doubt' test and not the 'prima facie' test. The magistrate had applied the wrong test at the close of the prosecution. The error committed by the magistrate was incapable of being cured (see pp 152D–E, 152I–153A, C).

(3) (per **Mokhtar Sidin JCA**) The magistrate was in error when she stated that upon the failure of the defence to raise any reasonable doubt then it was deemed that the prosecution had proved its case beyond reasonable doubt, as this test was never laid in any law or authority. The correct test which should have been applied at the close of the defence by the magistrate was whether the evidence adduced by the defence raised any reasonable doubt in her mind as to the guilt of the accused person in respect of the offence for which he was charged. If the defence succeeded in raising any reasonable doubt then the accused person is entitled to an acquittal. If the defence failed to do then the accused is to be convicted. The question of deeming does not arise at all (see pp 154H–155A).

(4) (per **Mokhtar Sidin JCA**) The identification parade was not properly held. From the evidence, most of the participants were of different age and height from the respondent and according to the authorities the identification parade held was certainly unfair to the respondent. It was not for the respondent to object but rather the duty of the officer conducting the parade to ensure that the parade was properly and fairly held by looking for participants who were of similar age, stature and appearance as the accused person (see pp 155C, 156A–C).

[Bahasa Malaysia summary

Responden didakwa di mahkamah majistret atas satu tuduhan utama dan satu tuduhan alternatif. Responden disabit kesalahan dan dihukum atas tuduhan alternatif tersebut. Kerana tidak puas hati dengan keputusan tersebut, responden kemudiannya merayu terhadap Mahkamah Tinggi, yang membenarkan rayuan beliau dan mengenepikan sabitan dan hukuman tersebut. Pendakwa Raya

merayu terhadap Mahkamah Rayuan. Perkara-perkara untuk diputuskan ialah: (i) sama ada rayuan dari pendakwa raya di bawah s 50(3) Akta Mahkamah Kehakiman 1964 ('AMK') dihadkan kepada persoalan undang-undang dan sama ada rayuan tersebut harus ditolak kerana tidak ada satu pun persoalan undang-undang yang dirumuskan oleh pihak pendakwaan ketika memfailkan petisyen rayuan seperti yang dibayangkan oleh s 50(2) AMK; (ii) sama ada majistret menggunakan ujian yang betul pada penghujung kes pendakwaan dan juga pada penghujung kes pembelaan; dan (iii) sama ada barisan pengecaman telah dilaksanakan dengan betul mengikut aturan.

Diputuskan, menolak rayuan tersebut:

(1) (oleh **Lamin PMR**) Seksyen 50(2) AMK bertujuan membuat peruntukan bagi rayuan yang memerlukan izin. Apabila izin perlu dipohon, ia membawa maksud bahawa pemohon tersebut mesti memuaskan mahkamah atas satu syarat tertentu; maknanya, mestilah terdapat perkara untuk dihujahkan. Dalam s 50(2) AMK, pemohon mestilah menunjukkan sama ada persoalan undang-undang wujud. Kewujudan persoalan undang-undang atau sebaliknya merupakan perkara untuk penghujahan di hadapan mahkamah apabila memohon izin. Pendakwa raya hanya perlu memfailkan notis rayuan dan bagi tujuan tersebut ia diperuntukkan secara tersurat bahawa 'tiada izin' diperlukan. Ini bermaksud bahawa tiada apa-apa untuk dihujahkan di hadapan mahkamah. Oleh itu, pendakwa raya tidak perlu membuktikan kepada mahkamah bahawa terdapat 'persoalan undang-undang yang dikemukakan dalam perjalanan rayuan atau penyemakan dan keputusannya oleh Mahkamah Tinggi telah menjejaskan kejadian rayuan atau penyemakan tersebut' (lihat ms 148H–149A).

(2) (oleh **Mokhtar Sidin HMK**) Ia dipersetujui bahawa kes ini dibicarakan dan diputuskan oleh majistret yang alim sebelum pindaan kepada s 173(f) Kanun Prosedur Jenayah ('KPJ') dan bahawa pindaan tersebut tidak mempunyai kesan kebelakangan. Memandangkan keadaan demikian, piawai pembuktian seperti yang dinyatakan dalam *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1 digunakan. Ujian yang perlu dipakai oleh majistret pada penghujung kes pendakwaan ialah ujian 'melampaui keraguan yang munasabah' dan bukannya ujian 'prima facie'. Majistret telah menggunakan ujian yang salah pada penghujung kes pendakwaan. Kesilapan yang dilakukan oleh majistret tersebut tidak dapat diperbetulkan (lihat ms pp 152D–E, 152I–153A, C).

(3) (oleh **Mokhtar Sidin HMK**) Majistret telah melakukan kesilapan apabila beliau menyatakan bahawa atas kegagalan pihak pembelaan mengemukakan apa-apa keraguan yang munasabah, ia kemudiannya dianggap bahawa pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah, kerana

ujian ini tidak pernah dicatat dalam apa-apa undang-undang atau otoriti. Ujian yang betul yang sepatutnya digunakan pada penghujung kes pembelaan oleh majistret ialah sama ada keterangan yang dikemukakan menimbulkan sebarang keraguan munasabah dalam mindanya terhadap kesalahan tertuduh atas kesalahan yang didakwa dilakukannya. Sekiranya pihak pembelaan berjaya menimbulkan sebarang keraguan yang munasabah, tertuduh tersebut berhak dibebaskan. Sekiranya pihak pembelaan gagal berbuat demikian, tertuduh akan disabit kesalahan. Persoalan anggapan tidak timbul langsung (lihat ms 154H–155A).

(4) (oleh **Mokhtar Sidin HMR**) Barisan pengecaman tersebut tidak dilaksanakan mengikut aturan. Dari keterangan yang ada, kebanyakan peserta adalah dari umur dan ketinggian yang berbeza dari responden dan menurut pihak berkuasa barisan pengecaman yang diadakan memang tidak adil terhadap responden. Ia bukan bagi responden untuk membantah tetapi adalah tanggungjawab pegawai yang mengendalikan barisan tersebut untuk memastikan bahawa barisan tersebut dilaksanakan mengikut aturan dan secara adil dengan mendapatkan peserta yang mempunyai umur, ketinggian dan paras rupa yang serupa dengan tertuduh (lihat ms 155C, 156A–C).

Notes

For cases on procedures for and principles governing appeal, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 403–417.

For cases on trial generally, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 3206–3638.

Cases referred to

Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1 (folld)
Chan Sin v PP [1949] MLJ 106 (refd)
Harun bin Abdullah v PP [1998] 3 MLJ 1 (refd)
Saad Abas & Anor v PP [1991] 1 MLJ 129 (refd)
Surandran a/l Rajaretnam v PP [1998] 2 MLJ 49 (refd)
Teo Peen Soon & Ors v Reg [1956] MLJ 241 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 50(2), (3)
Criminal Procedure Code s 173(f)

Appeal from: Criminal Appeal No 41–185 & 198–1989 (High Court, Shah Alam)

Muniandy Kannyappan (Attorney General's Chambers) for the appellant.

Shahul Hameed Amirudin (*Zul Rafique & Partners*) for the respondent.

Lamin PCA. : The hearing of this appeal commenced on the morning of 9 October 2000 and submissions were continued in the afternoon and the following day when it was postponed to a date to be fixed for decision. When we sat on 23 November 2000 and before we could deliver our judgment, which was ready, En Shahul Hameed Amirudin, learned counsel for the respondent asked the court that he be allowed to make a further submission on the interpretation of sub-ss (2) and (3) of s 50 of the Courts of Judicature Act 1964 ('CJA') that took the form of an objection as to the manner the appeal was lodged and argued by the learned deputy public prosecutor. The learned deputy public prosecutor, En Muniandy Kannyapan informed the court that En Shahul intimated to him of his proposed objection only that morning. However, he was prepared to make a submission in reply if the court decided to hear the objection.

Encik Shahul's main complaint was that there was not a single question of law formulated by the prosecution when filing the petition of appeal as envisaged by sub-s (2) of s 50 of the CJA and the appeal must therefore be dismissed. For ease of reference we reproduce below s 50(2) and (3) of the CJA:

> (2) An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, against any decision of the High Court in the exercise of its appellate [or revisionary] jurisdiction in respect of any criminal matter decided by a Magistrates' Court but such appeal shall be confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.
>
> (3) Notice of any appeal by the public prosecutor shall be given by, or with the consent in writing of, that officer only; and notwithstanding sub-s (2) no leave of the Court of Appeal is required.

In support of his contention that the question of law must be formulated, he referred to the judgment of this court in the case of *Saad Abas & Anor v PP* [1999] 1 MLJ 129, where we said (at p 138):

> Now one final and vital point to be shown in an application made under s 50(2) is one without which the application maybe dismissed. It is this. The affidavit in support must formulate the 'questions of law' which have arisen in the course of the appeal 'and the determination of which by the High Court has affected the event of the appeal.' Not one such 'question of law' was formulated. If we had so minded we could have summarily dismissed the application on this ground.

In that case, Saad Abas and another were jointly tried before a magistrate for a criminal offence and they were acquitted and discharged at the end of the prosecution case. On appeal by the learned public prosecutor, the High Court allowed it in the terms that they were to enter their defence. They were not satisfied with the said order and they then filed an application for leave to appeal against it under s 50(2) of the CJA. The application for leave to appeal was dismissed. The court had to decide whether in the circumstances of this case the word 'decision' found in sub-s (2) fell within the meaning of the word 'decision' as defined in s 3 of the CJA. Further, the

court found that not one question of law was formulated in the affidavit in support.

It was a straightforward case in the sense that the court had only to deal with the application of sub-s (2). Subsection (2), in my view, was drafted especially for the benefit of an aggrieved accused person. As for the public prosecutor, he may avail himself of the provision of sub-s (3). Subsection (2) stands on its own while sub-s (3) has to be read with sub-s (2) because of the phrase 'notwithstanding sub-s (2)' found in sub-s (3). When an accused person desires to appeal, the full force of sub-s (2) comes into play. He has to apply for 'leave' and his appeal must be 'confined to *only questions of law* which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.'

To obtain 'leave' in order to enable him to file the notice of appeal, he has to satisfy the court that there are questions of law of the type as specified in sub-s (2) and he must formulate those questions for ease of recognition and determination by the court. If we may repeat, he must first obtain the 'leave' before he can file the notice of appeal.

As for the public prosecutor, it is clear that he is not required to apply for 'leave' (sub-s (3)). But is he in the same position as the accused in that he has to show in the same manner that there exist questions of law? The second limb of sub-s (3) reads:

> and notwithstanding sub-s (2) no leave of the Court of Appeal is required.

Black's Law Dictionary (7th Ed) defines the word 'notwithstanding' as 'despite, in spite of.' It is a common word. We do not need to research further for its meaning. To put it succinctly, what that phrase means is that notwithstanding whatever is provided in the whole of sub-s (2), the public prosecutor is not required to apply for leave if he wishes to appeal. He merely files the notice of appeal. The fact that he is not required to apply for leave to appeal means that he is free to appeal against the order of acquittal and sentence. An accused person having been sentenced by a Magistrate may appeal to the High Court on the question of sentence only but he cannot appeal further to the Court of Appeal because there will be no 'question of law, etc …' to support his application for leave.

Now, sub-s (2) states 'An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, … but *such* appeal shall be confined to only questions of law.'. (Emphasis added.) The words 'such appeal' must refer to the appeal 'with the leave' or requiring leave. So sub-s (2) is aimed to make provision for an appeal requiring leave. When leave is required to be applied for, it connotes that the applicant has to satisfy the court as to a certain condition; meaning that there must be a subject matter for arguments. In sub-s (2), the applicant must show whether or not there exist questions of law. So the existence or otherwise of the questions of law is the subject matter for submission before the court. The applicant, as we have said earlier, is no other than the aggrieved accused person. On the other hand, the public prosecutor needs only to file a notice of appeal and for that

purpose, it is expressly provided that no leave is required. That means there is nothing to submit before the court. With respect, we are of the view therefore that the public prosecutor is not required to show to the court that there are 'questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.'

One may ask as to what the rationale is for requiring the aggrieved accused to show the existence of 'questions of law …' while it is not so required on the part of the public prosecutor. When it is said that the public prosecutor's appeal is not confined to questions of law because he is not required to apply for leave, it means that the public prosecutor has the liberty to re-examine every aspect of the case. Before the public prosecutor decides to bring an accused person to court with a charge that he has committed a criminal offence, he must be satisfied that he has sufficient evidence against the accused to answer. Therefore, especially when the accused is acquitted at the end of the case for the prosecution, immediately it comes to mind that there must be something wrong in the case. Therefore, it is only reasonable to grant the public prosecutor, being the guardian of public and State's interests, the privilege to re-examine the whole case so far presented to the court before a higher tribunal, i.e. by way of an appeal.

On the other hand, cases that go on appeal under sub-s (2) are those where a conviction has been recorded and not involving serious criminal offences, being those coming only from a magistrate's court and in most cases there will only be a finding of fact. So it is not unreasonable or unjust to confine the accused's appeal to only questions of law.

So in conclusion, with regard to the case before us, the approach adopted was proper and correct in that no question of law had been formulated for argument.

Mokhtar Sidin JCA. : We have dismissed the appeal on 5 February 2001 and now we give our reasons for doing so.

The respondent was charged in the magistrate's court at Petaling Jaya as follows:

Principal charge

> That you on the 8 February 1988, at the United Malayan Banking Corporation, Sungai Way, Subang Branch, in the District of Petaling Jaya, in the State of Selangor Darul Ehsan, voluntarily assisted in the disposal of property to wit Employees Provident Fund Warrant No 526702 amounting to $246,151.96 which you had reason to believe to be stolen property and that you have thereby committed an offence punishable under s 414 of the Penal Code.

Alternative charge

> That you on the 8 February 1988 at the United Malayan Banking Corporation, Sungai Way, Subang Branch, in the District of Petaling Jaya, in the State of Selangor Darul Ehsan, voluntarily assisted in making away with

property to wit a sum of $246,151.96 in respect of Employees Provident Fund Warrant No 526702 which you had reason to believe to be stolen property and that you have thereby committed an offence punishable under s 414 of the Penal Code.

The learned magistrate convicted the respondent on the alternative charge and sentenced him to 26 months' imprisonment and also a fine of RM10,000 or in default eight months' imprisonment. Being dissatisfied with the said decision, the respondent then appealed to the High Court. The learned judge of the High Court allowed the appeal and set aside the conviction and the sentence. The learned public prosecutor being dissatisfied with the decision of the learned judge now appeals to this court.

During the submission of the learned counsel for the respondent, he raised a preliminary point as to whether the appeal by the learned public prosecutor was properly put before this court in view of ss 50(2) and (3) of the CJA. It was submitted by the learned counsel that s 50(2) was applicable to both the prosecution and the accused when the case originated from the magistrate's court. The learned President of the Court of Appeal had delivered the judgment of this court in respect of this issue on 12 January 2001. A copy of the judgment is attached herewith.

On the appeal proper, it is clear to us at the High Court both sides argued the appeal fully, including the defence. In his judgment, the learned judge allowed the appeal by the respondent solely on the ground that PW21 was an accomplice and that it is an accepted principle of law that the evidence of an accomplice, unless corroborated, should not be relied upon to convict an accused. In his judgment, his Lordship stated:

> In the opinion of this court, if there is any independent confirmation tending to connect the appellant with the offence and thus corroborating the evidence of PW21 is the briefcase. In the briefcase was various discriminating evidence which included documents and paraphernalia related to the purpose of defaulting EPF payments. Also included therein was a horoscope book which has a name, address, telephone number and date of birth written thereon similar to that of the appellant, except that the last two digits of the telephone number were incorrectly placed. Of the documents found (besides the horoscope book) the learned magistrate singled out P4(B)(1). This document with handwritings was duly examined by PW2, the handwriting expert attached to the Chemistry Department of Malaysia. PW2 found that the handwritings therein were similar to those specimen writings provided by the appellant. Based on this, and that of the horoscope book the learned magistrate was of the opinion that the briefcase belonged to the appellant. This is indeed a fundamental error.
>
> To begin with, P4(B)(1) was not a document found in the briefcase. It was a document taken from the EPF file. If this document was not from the briefcase, there can be basis to infer that the briefcase belonged to the appellant. PW2 may have found the handwriting on this document similar to that of the appellant, but the issue here is not whether this document was forged by the appellant it is whether the briefcase belonged to the appellant, and one of the vital factors is that P4(B)(1) must be found in the briefcase in order for the magistrate to return a positive answer. Absence of P4(B)(1) in the briefcase demolished the magistrate's finding on this point.

This court shall now proceed to examine the horoscope book which the learned magistrate found to belong to the appellant. This book has a name similar to that of the appellant together with an address and slightly incorrect telephone number of the appellant's residence in Kuala Lumpur. Further, it was contended that the date of birth which the horoscope was charted for matches that of the appellant. For this reason, the prosecution alleged that this briefcase must have belonged to the appellant. To place such heavy reliance on this fact to imply not just that this book belonged to the appellant but also because it was in the briefcase, the same must have also belonged to him is certainly against the principle of proving beyond reasonable doubt. This is particularly so when there exists other equally important circumstantial evidence to imply others having ownership of this briefcase.

Firstly, there is evidence adduced by the prosecution themselves that the writings (i.e. the particulars on the horoscope book) was not that of the appellant. It was admitted that an Indian astrologer prepared this book including the insertion of these particulars on information given by a man. This man, however has never been identified.

Secondly, the briefcase which was locked, was not opened by the appellant. Instead, it was opened by PW21, the accomplice himself who obviously knew the correct combination numbers to the lock. This prior knowledge of the correct combination number is not unsimilar to a person owing a key to the lock, thus also implying ownership of the briefcase itself.

Thirdly, in the briefcase, besides the horoscope book, was an identity card. This card has a photograph of a person known as Jeeva. The police authorities had knowledge of his whereabouts but he was never called to testify. Similarly, by implication like that of the horoscope book, this briefcase could have also belonged to Jeeva.

Based on these circumstances, this court finds that the learned magistrate has erred in giving undue weight on the existence of the horoscope book with particulars to arrive at her decision that the briefcase must have belonged to the appellant.

Without the ownership of the briefcase being proved to belong to the appellant, there is no independent confirmation tending to connect the appellant with the offence which could corroborate the evidence of PW21. PW21's evidence should therefore be discarded by the learned magistrate. Such being the case, the six reasons given based on the uncorroborated testimony of PW21 are invalid.

The learned judge then allowed the appeal and set aside the conviction and the sentence imposed by the magistrate. Being dissatisfied with that decision, the public prosecutor appealed. The only ground of appeal by the public prosecutor was that the learned judge had erred when he concluded that there was no corroboration of the evidence of the accomplice (PW21) in respect of the briefcase. It was submitted by the learned deputy public prosecutor that the learned judge should have considered the evidence of the prosecution as a whole and then determined whether the evidence of PW21 had been sufficiently corroborated. After hearing the submissions of both sides, we had intimated to the parties that we agreed with the learned deputy public prosecutor that the learned judge had erred on this point and there was sufficient evidence of corroboration of PW21's testimony. On this intimation, the learned counsel then asked for leave to address us on other

points which were not raised in the grounds of appeal. It was submitted by the learned counsel that the points to be raised by him were raised by the learned judge, but those points were not touched on by the learned judge in his judgment. Those points were important because they had bearings on the defence. The learned deputy public prosecutor left it to the court whether to allow the respondent to address this court on those points. In the interest of justice, we then allowed the learned counsel to address us on those points. We also gave the parties time to prepare their submissions.

After hearing the submissions of the learned counsel for the respondent, we found that the respondent had two important and pertinent issues which merit our consideration:

1 Did the learned magistrate apply the right test at the close of the prosecution and also at the close of the defence?

2 The identification parade was not properly held.

Did the learned magistrate apply the right test at the close of the prosecution and also at the close of the defence?

It is common ground that this case was heard and decided by the learned magistrate before the amendment to s 173(f) of the Criminal Procedure Code ('CPC') and that the amendment had no retrospective effect. In view of that, the standard of proof as stated in *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1 applied. In that case the Federal Court by a majority decision held:

> The prosecution had to prove every ingredient of a charge and at the end of the case for the prosecution, the court should then evaluate all the admissible evidence as adduced relevant to the charge and decide whether to call an accused to enter his defence. Under s 180 of the Code, the prosecution was obliged to make out against an accused a case which if unrebutted would warrant his conviction before the accused could be called upon to enter on his defence. Since in order to convict the accused, if the case for the prosecution was not rebutted, the court must be satisfied of the guilt of the accused beyond all reasonable doubt, the court before calling the accused to enter upon his defence must be satisfied that the prosecution had made out a case against the accused beyond all reasonable doubt. Therefore the standard of proof required from the prosecution at the close of its case, in a non-jury trial in Malaysia was, having regard to the statutory formula in s 180 of the Code, the usual criminal standard of proof, to wit, the beyond all reasonable doubt standard of proof, which called for a maximum evaluation of the evidence tendered by the prosecution. 'A more rigorous test of credibility' was to be applied to the prosecution's evidence, instead of the much lower *Haw Tua Tau* standard of proof of a mere prima facie case which called for a minimal evaluation of the evidence tendered by the prosecution ...

That case made it clear that the test to apply at the close of the prosecution was the 'beyond reasonable doubt' test and not the 'prima facie' test. It is only with the introduction of the amendment of s 173(f) of the CPC that the prima facie test applies at the close of the prosecution. This amendment has no retrospective effect. As we have stated earlier, the correct test to be

applied by the learned magistrate at the close of the prosecution in this appeal was the 'beyond reasonable doubt' test. In her judgment the learned magistrate said:

> After having heard the evidence given by the prosecution witnesses and the submissions of both learned DPP and learned defence counsel the court is satisfied that *the prosecution has proven a prima facie case against the accused and therefore defence is called.* (Emphasis added.)

With this, it is clear to us the magistrate had applied the wrong test at the close of the prosecution. It is obvious to us that the learned magistrate had erred when she applied the wrong test to call for the defence.

The learned counsel for the respondent submitted that the learned magistrate had committed a grave and fatal error when she called for the defence on the basis of prima facie test. It was further submitted that this error was not capable of being cured and he cited *Harun bin Abdullah v PP* [1998] 3 MLJ 1 and *Surandran a/l Rajaretnam v PP* [1998] 2 MLJ 49. In *Harun bin Abdullah*, Abdul Malek Ahmad JCA (as he then was) delivering the judgment of the court at p 12 stated:

> The amendment has no retrospective effect as decided by the Federal Court in *Bahruni bin Ismail v PP and Dalip Bhagwan Singh v PP* [1998] 1 MLJ 1. The amendment came about because of the divided views of the Federal Court in *Arulpragasan a/l Sandaraju v PP* where the majority view was that the duty of the prosecution at the close of the prosecution's case is to prove a case beyond reasonable doubt. The standard of proof in the instant appeal, therefore, would be proof beyond reasonable doubt and not the prima facie test.
>
> On these considerations, in applying the subsection to the situation in this appeal, as has been agreed to by both learned counsel and the learned deputy public prosecutor, the latter as regards the proviso in particular, we must find that the learned sessions-court judge had misdirected herself when she applied the prima facie test. With us applying the more stringent reasonable doubt test to the facts of this case on the evidence available, we could only conclude that the result would certainly not be the same as we hold that no case had been made out against the appellant beyond reasonable doubt. Consequently, the defence of the appellant should not have been called.
>
> We must reiterate that since this was a breach of an explicit provision of the CPC and a principle of general importance in the administration of justice, it was not an error, omission or irregularity for which a finding, sentence or order could be reversed or altered under s 422 of the CPC. This is irrespective of whether such error, omission or irregularity has occasioned a failure of justice. In effect, the said section cannot be applied for cases where the wrong standard of proof has been applied.
>
> This is certainly an illegality and not a mere error, omission or irregularity.....

Shaik Daud JCA in *Surandran a/l Rajaretnam v PP* [1998] 2 MLJ 49 at p 52 stated:

> The learned deputy public prosecutor while conceding that the learned sessions judge did not apply the beyond reasonable doubt standard, further contended that, whatever be the standard of proof applied, whether prima

facie or beyond reasonable doubt standard, the sessions judge would have arrived at the same decision. A

With respect, we are unable to agree with this submission. The issue in this appeal is not as contended by the learned deputy public prosecutor. The issue is whether the learned sessions judge applied the right and proper standard of proof at the close of the case for the prosecution.

B

The issue of whether the prosecution at the close of its case is required to prove a prima facie case or to prove a beyond a reasonable doubt case (sic) has been of great controversy for a number of years. As stated in *Bahruni bin Ismail v PP* [1997] 2 MLJ 265, 'without embarking into the history on this issue all over again' It has now finally come to rest with the decision in *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1, where at p 12 of the report it was held that the standard of proof at the close of the case for the prosecution is beyond reasonable doubt. Therefore, in the light of this decision, to all intents and purposes, the standard of proof to be applied in all cases whether before or after *Arulpragasan's* decision, must necessarily be beyond reasonable doubt.

C

…

Therefore, in the instant appeal, we were unanimously in agreement with the submission of Mr Karpal Singh that the learned sessions judge erred in law when he applied the prima facie standard of proof at the close of the case for the prosecution. We held that there was clear misdirection by the trial judge. We also held that a misdirection of this nature which goes to the very root of the matter, is incapable of being cured by the provision of s 422 of the Criminal Procedure Code, as the misdirection involves a principle of general importance in the administration of justice.

D

E

Against those authorities, the learned deputy public prosecutor contended that the error was curable. He went on to say that after perusing the evidence of the prosecution as a whole there is overwhelming evidence to show that the prosecution at the close of the prosecution had proved the guilt of the accused beyond reasonable doubt; the defence should be called even though the learned magistrate had named the wrong test of prima facie. No authorities were cited to us and it was not pointed out to us the evidence relied upon to show that the prosecution had proved the case beyond reasonable doubt. Whatever it is, it is clear to us from the authorities the error committed by the learned magistrate is incapable of being cured.

F

G

In the present appeal, the learned magistrate had not only committed an error at the close of the prosecution, she had also committed another error at the close of the defence when she stated in her judgment as follows:

> According to s 173(f) CPC requires the accused to rebut the prosecution's case i.e. to raise a reasonable doubt and if he fails to discharge that onus, the prosecution is deemed to have proved its case beyond a reasonable doubt and the accused could be convicted of the charge.

H

First of all the learned magistrate was in error when she stated that upon the failure of the defence to raise any reasonable doubt, then it was deemed that the prosecution had proved its case beyond reasonable doubt. It is clear to us this test was never laid in any law or authority. The correct test which should have been applied at the close of the defence by the magistrate was whether the evidence adduced by the defence raised any reasonable doubt

I

in her mind as to the guilt of the accused person in respect of the offence for which he was charged. If the defence succeeded in raising any reasonable doubt, then the accused person was entitled to an acquittal. If the defence failed to do then the accused was to be convicted. The question of deeming does not arise at all.

It is obvious to us that the learned magistrate had erred when she applied the wrong test at the close of the prosecution case and also at the close of the defence.

The identification parade was not properly held

Another important issue raised by the respondent was the identification parade held by the police where PW14 identified the respondent. The issue raised by the learned counsel for the respondent was in respect of the conduct of the parade itself in that the parade was not properly conducted. Two points were raised by the learned counsel for the respondent in respect of this.

The first point was in respect of the participants who took part on the identification parade. From the record it is clear that at the time when the parade was conducted the accused was 43 years of age. From the evidence there were seven participants on the parade, the youngest being 24 years and the oldest was 51 years of age. Of those seven, only three participants were almost of the same age group as the respondent. Those three were 38, 39 and 45 years of age. In addition, it was established and not disputed that compared to the participants, the respondent was the tallest. Only two of the participants, though shorter, were almost of the same height as the respondent.

The second point raised was that the respondent was not allowed to shave. According to the respondent, he had requested that he be allowed to shave before the parade was held.

In respect of the identification parade, we would like to refer to the judgment of Willan, CJ in *Chan Sin v PP* [1949] MLJ 106 at p 108:

> We would further point out that in this country it has always been the practice in police identification parades that all the persons on the parade should be of the same nationality as that of the suspected person, as far as possible they should be from the same station in life as that of the suspected person; and also there should be no great disparity of ages in the persons on the parade.

In *Teo Peen Soon & Ors v Reg* [1956] MLJ 241, Whyatt CJ at p 243 said:

> Now with regard to the third appellant, the prosecution's case is a little stronger because the evidence given at the trial shows that the complainant did identify him at an identification parade. At the hearing of this appeal however, when the third appellant was asked what he wanted to say to the court, he stated that when he was picked out at an identification parade, the other persons on the parade were school boys with two exceptions; those two exceptions were tall persons like himself. He then went on to say that those two tall persons were taken away from the parade before the complainant was actually asked if she could make her identification and he summed up his

version of that identification parade by saying he thought it was unfair. If his account of it is truthful and accurate, it certainly was unfair.

From the evidence which we have stated earlier, most of the participants were of different age and height from the respondent and according to the authorities, the identification parade held was certainly unfair to the respondent. The learned deputy public prosecutor in his reply conceded the disparity but submitted that the respondent did not raise any objection when the parade was held. With the greatest respect to the learned deputy public prosecutor, we are of the view that it was not for the respondent to object but rather the duty of the officer conducting the parade to ensure that the parade was properly and fairly held. To ensure that the parade is properly and fairly held it is the duty of the officer conducting the parade to look for participants who are of similar age, stature and appearance as the accused person.

For the reasons we have stated, we find that the evidentiary value of the identification parade is worthless and the learned magistrate should not have considered the evidence of identification of the respondent by PW14 at the parade.

Conclusion

For the reasons above stated, we are of the view that the learned magistrate had committed fatal errors and flaws in arriving at her findings. For those reasons her decision could not be upheld. Thus, for different reasons, we agree with the learned judge that the conviction of the respondent should be set aside and the sentence imposed quashed. The appeal by the public prosecutor is hereby dismissed and the order of the learned judge of the High Court is hereby affirmed.

Appeal dismissed.

Reported by Moy Saw Han